371. In principle it is objectionable as varying the terms of the contract. B agrees to perform in December. How can he be brought into court in June for failure to do what he had not agreed to do until six months later? Lord Campbell resorts to a theory of a "contractual status" which has been disturbed by the defendant's repudiation. This is in effect reading into the contract a term that if either party repudiates it, such repudiation shall amount to a breach. Then as a limitation on this is the further anomaly that the fact of the promisor's breach is made to depend on conduct of the promisee, that is, on whether he has acted on the repudiation. Nor is this radical departure from principle called for by the exigencies of the situation. Lord Campbell's dilemma was this. If, after the renunciation, the plaintiff did not remain in readiness to perform, he would break the contract himself and lose his right of action against the defendant. If he did remain in readiness the damages would be increased to the needless hardship of the defendant. The immediate right of action would do away with both hardships. But the same result could be reached by much more conservative means. At the time of *Hochster* v. *De La Tour*, supra, Baron Parke had already decided that repudiation as well as failure of performance by one party would excuse the other from remaining in readiness to perform. *Ripley* v. *McClure* (1849) 4 Ex. 345. If then, when the time for performance came, the repudiator still failed to perform, the other party could recover. If he were ready to perform and the other party had not altered his position in reliance on this repudiation, there would be no hardship in letting him do so. If, however, the other party had altered his position in such reliance it would seem that the court would be amply justified in refusing to let the repudiator play fast and loose with his contract by setting up as a defence to an action for the breach his then willingness to perform. On the other hand, there is a grave practical objection to the application of the doctrine of anticipatory breach. Damages assessed before the time for performance are necessarily conjectural. In some classes of contracts they are apt to be wide of the mark. Further, often in the event of a certain contingency all liability under a contract may be discharged. In such a case, a defendant might often be mulcted in damages where, if he had not evinced his mental attitude, he might have escaped liability.

POWER OF THE LEGISLATURE TO REGULATE CRIMINAL CONTEMPTS OF COURT.—In their origin criminal contempts of court seem to have been but one of a class of crimes known as "contempts" and to have been punished by the same procedure as other crimes. Indeed they have never ceased to be indictable at common law. There early grew up, however, a coördinate procedure by which the court itself prosecuted and punished first, contempts committed immediately in its view and later, constructive contempts. But

this anomaly in procedure did not affect their character as crimes. For example, it is generally accepted that they are within the scope of the pardoning power. 3 COLUMBIA LAW REVIEW, 45, 348. Is a statute limiting such criminal contempts and regulating the procedure by which they may be punished constitutional as applied to courts created by the constitution? The answer has varied with the emphasis that the courts have laid on different aspects of the doctrine of the separation of powers. It is a principle of this doctrine that legislative powers should not be assumed by the courts nor judicial powers by the legislature. The power to make laws as to crimes is distinctly legislative. The crime of contempt of court would seem to fall within it just as other crimes do unless there is a provision of the constitution to the contrary. Under this principle, while the courts have the right to define the crime of contempt, yet their definition and procedure must conform to a statute if one be passed. This view finds some recognition in the cases, ex parte *Edwards* (1867) 11 Fla. 174; in re *Munsell* (1886) 101 N. Y. 245.

Relying on another aspect of the same general doctrine some courts have taken a directly contrary view. It is also a principle of this doctrine that one department of the government cannot exercise its power, in the absence of express constitutional authorization, in such a way as to threaten the independence and effective existence of another department. Applying this principle, it is said that a constitution, in creating a court, confers on it as necessary to its existence the broad powers over contempts exercised at common law, and takes away from the legislature all power to alter the definition of the crime, to regulate the procedure that the court may use in punishing it, or to limit the discretion of the latter in the imposition of the penalty. An analogy is drawn between this implied limitation on the law-making department and that on the judicial department, by which the latter is restricted from interfering with the judicial action of the legislature in punishing contempts against itself. Adopting this view, a Missouri court recently held a limiting statute unconstitutional and punished a form of constructive criminal contempt not provided for thereby. *State* v. *Shepherd* (Mo. 1903) 76 S. W. 79. This is the rule in several jurisdictions. *State* v. *Morril* (1855) 16 Ark. 384. The U. S. statute limiting contempts has been upheld as to the circuit courts but the question of the constitutionality of its application to the Supreme Court was expressly reserved. Ex parte *Robinson* (1873) 86 U. S. 505.

There is a third view. Giving effect to the first aspect of the doctrine of the separation of powers criminal contempts are held to be crimes and subject like other crimes to the law-making power of the legislature. But, giving effect to the second aspect of the doctrine, if this power is exercised in such a way as to threaten the effective existence of a coördinate branch of the government by emasculating its protective remedy of contempt process, such exercise would be unconstitutional. Under this view the legislature can safeguard the individual from arbitrary action by the courts

by limiting the penalty, regulating the procedure and defining the crime. At the same time the courts are protected against assault. This seems to be the sounder law and more in accord with the spirit of our institutions. It has been laid down by a number of courts with varying degrees of distinctness and is reconcilable with the actual decisions in most of the cases. *Batchelder* v. *Moore* (1871) 42 Cal. 412; *Dunham* v. *State* (1858) 6 Ia. 245.

RECOVERY IN QUASI-CONTRACT AGAINST MUNICIPAL CORPORATIONS.—It is a fundamental proposition of the law of municipal corporations that contracts can be made by them only within the limits prescribed by the legislature. When these limits are transgressed the attempted contract is a nullity. If, however, under a void agreement benefits have been conferred upon the corporation at its request should the ordinary rules of quasi-contract be applied and recovery be allowed as if the municipality were a private corporation or does public policy demand that recovery should be denied in any form of action? The recent case of *Union Nat. Bank of Muncie* v. *Franklin School Tp.* (Ind. 1903) 68 N. E. 328, suggests the advisability of ascertaining just when reparation should be made and when not. The cases fall into more or less well defined classes, but unfortunately there is a lack of harmony in every class. Still a close inspection shows a general working principle underlying the whole subject. It is this: Municipal corporations stand in particular need of protection against their officers. In order to afford this protection the legislature has usually defined minutely the powers of these officers and the manner in which the same shall be exercised. When any act of the corporation, through its officers, will, directly or indirectly, vary in kind or degree the burden thus authorized to be placed upon the members of the corporation, public policy demands that recovery in any form shall be denied. If, however, reparation will not in any manner affect the burden upon the tax-payers the ordinary principles of quasi-contract will be applied.

The following classes embrace most of the cases that have arisen: First class—where the corporation has no power at all to make the attempted contract. This class should be subdivided as follows: (1) if reimbursement for the services or property received by the corporation would, in any manner, increase or vary the prescribed burden upon the taxpayers, there should be no recovery either in contract or quasi-contract. *Agawam Nat. Bank* v. *South Hadley* (1880) 128 Mass. 503; *Litchfield* v. *Ballou* (1884) 114 U. S. 190; contra, *Argenti* v. *San Francisco* (1860) 16 Cal. 256. (2) But if recovery by the plaintiff means in effect mere restitution of what the corporation has unlawfully received, recovery is allowed in quasi-contract. *Dill* v. *Wareham* (1844) 7 Metc, 438; *Leonard* v. *City of Canton* (1858) 35 Miss. 189. In such a case equity will not relieve the municipal corporation from such a con-